BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JASON D. KASPER	)	
Claimant	)	
	)	
VS.	)	
	)	
PRODUCT MANUFACTURING CORP.	)	
Respondent	)	Docket No. 1,049,747
	)	
AND	)	
	)	
ONEBEACON AMERICAN INS. CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the March 30, 2010, preliminary hearing Order entered by Administrative Law Judge John D. Clark. John L. Carmichael, of Wichita, Kansas, appeared for claimant. Kendall R. Cunningham, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was injured out of and in the course of his employment with respondent and that respondent had notice of claimant's injuries. Dr. Prince Chan was authorized as claimant's treating physician, and temporary total disability benefits were ordered paid if claimant is taken off work.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 30, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that claimant did not prove that he was injured in an accident that arose out of and in the course of his employment. Respondent asks that the Board reverse the ALJ's Order awarding claimant preliminary benefits.

Claimant asks that the Order of the ALJ be affirmed.

The issue for the Board's review is: Did claimant suffer injury by accident that arose out of and in the course of his employment at respondent?

FINDINGS OF FACT

Claimant testified that on either November 14 or 15, 2008, he was loading a part into a machine. He said he was either tightening or loosening the vise jaw when he felt a tear in his right shoulder. He said that the part he was working on at the time was a large piece of aluminum. He said he was working on more than one project that day. He said that at times, when people leave, he may run several machines. On weekends, fewer people are working, so those who do work have to keep several machines running. So at times, he could be working on a machine which he had not logged onto.

Claimant reported the injury to one of his supervisors the same day it occurred, and respondent arranged for him to receive medical treatment at the Wichita Clinic. The first time he was treated at the Wichita Clinic was on November 19, 2008, when he was seen by Dr. Romeo Smith. Claimant gave a history of "working on a loading and unloading machine"[1] opening and closing the big vise jaw to put parts in the machine. Claimant said he started to develop pain in the right shoulder after doing this numerous times. After an examination, Dr. Smith diagnosed claimant with right shoulder strain/rule out rotator cuff tear. Claimant was released to return to work on limited duty with restrictions.

Claimant had a previous workers compensation claim in which he had bilateral shoulder replacements in 2000 or 2002. He testified that he got along fine after those shoulder replacements. He had no restrictions when he went to work at respondent. Because of his hardware, however, Dr. Smith ordered a CT scan of claimant's right shoulder rather than an MRI. The CT scan was performed on December 12, 2008. Dr. Smith's medical report of December 16, 2008, indicates that even on the CT scan, "[m]uch of the detail was obscured by the artifact."[2] His diagnosis remained right shoulder strain/rule out rotator cuff tear. Claimant was again returned to work on light duty with restrictions. Dr. Smith referred claimant to Dr. Prince Chan, who had performed the previous shoulder replacements on claimant.

Although Dr. Smith referred claimant to Dr. Chan at the December 16, 2008, visit, claimant did not actually get to see Dr. Chan until August 25, 2009. Dr. Chan's records indicate claimant gave him a history of loading a part that weighed about 50 to 60 pounds into a machine at work when he felt something tear in his shoulder. Dr. Chan diagnosed claimant with right shoulder pain with a history of right shoulder replacement, with subsequent bursitis and possible rotator cuff injury. Dr. Chan provided claimant with a

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[1] P.H. Trans., Cl. Ex. 1 at 1.

[2] *Id.*, Cl. Ex. 1 at 3.

cortisone injection in his shoulder and indicated he may need an arthrogram to further evaluate his shoulder, as well as physical therapy to strengthen the shoulder. Dr. Chan opined that claimant's right shoulder complaint was 100 percent related to his work injury at respondent.

Devin Bahm, respondent's production manager, testified that every work order at respondent has a bar code that employees scan into their machines. Mr. Bahm said that respondent's records show that on November 14 and 15, 2008, claimant was working on small pieces of steel that weighed .58 pound each. He said that based on the information respondent had regarding claimant's log-in, claimant was not working a job involving a large piece of aluminum on those days. When asked if claimant could have been working on machines that other employees were logged onto, Mr. Bahm testified "I'm not saying there is not ever somebody that's going to help load I guess, you know, somebody else's machine, you know, as team work type of deal maybe . . . ."[3] Mr. Bahm said that when employees are at lunch or on break, other employees in the shop sometimes operate their machines.

Eric Shaffer, respondent's human resources manager, testified that when claimant was first seen at the Wichita Clinic, he was given work restrictions. Respondent was able to accommodate those restrictions. Claimant was terminated from respondent on December 29, 2008. He testified: "The reason that I left was because they wouldn't follow up on getting me to see the doctor."[4] Mr. Shaffer testified, however, that the reason for claimant's termination was his failure to correct attendance issues he had been having since before the accident of November 14 or 15, 2008.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[3] P.H. Trans. at 28.

[4] P.H. Trans. at 13.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[8] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[9]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

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[5] K.S.A. 2009 Supp. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[7] *Id.* at 278.

[8] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[9] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997)*; Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[10] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[11]

ANALYSIS

Claimant has been consistent that his symptoms began at work, but he has not provided consistent descriptions of what he was doing when those symptoms began. According to respondent's records, claimant was not working with the size of parts he described to Dr. Chan, nor was he logged on to the type of machine that he alleges he was operating. Claimant's supervisor, however, acknowledges that it is possible claimant was helping a coworker or filling in for another worker on a machine that claimant was not logged onto. Therefore, the fact claimant was not logged on to the machine is not fatal to his claim. Nevertheless, the inconsistencies do raise doubts about claimant's contention of a work-related accident. Claimant relates the inconsistent histories in the medical records to errors in transcription and to the physicians' misunderstanding of the job claimant was performing. Claimant contends that whether he was loading or unloading a part or whether he was tightening or loosening the vise jaw grips are insignificant distinctions. Claimant reported his injury the same day it occurred, and respondent eventually sent him for medical treatment.

The ALJ obviously found claimant's testimony to be credible because he awarded preliminary benefits. After reading the testimony and considering the exhibits, this Board Member agrees with the ALJ's findings and conclusions.

CONCLUSION

Based on the record presented to date, claimant has met his burden of proving he suffered personal injury by an accident arising out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated March 30, 2010, is affirmed.

IT IS SO ORDERED.

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[11] K.S.A. 2009 Supp. 44-555c(k).

Dated this _____ day of June, 2010.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge